

a

FAM AN NGIU & ORS.

v.

SRI INDAH SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU

MOHD. YUSOFF MOHAMED J

[CIVIL SUIT NO. 23-99-86]

5 AUGUST 1989

b

CIVIL PROCEDURE: Summary judgment - Order 14 of the Rules of the High Court 1980 - Whether there are triable issues.

c

CONTRACT: Sale of shares - Breach of fundamental terms - Termination of contract.

The plaintiffs claim for the sum of RM15,378,000 as balance of the purchase price for the sale of shares in Mengkibol Kemajuan Sdn. Bhd. (Mengkibol) to the defendants.

On 13 June 1984 the defendants terminated the agreement on the grounds that there was a breach of fundamental terms of the contract and misrepresentation by the plaintiff's with regards to the availability of the qualified titles.

d

On 29 June 1984, the plaintiff's solicitors objected to the defendants termination and a notice of demand for the balance of the purchase price was sent on 2 December 1985.

The defendants failed to pay and the plaintiffs instituted this claim against the defendants followed by an application for summary judgment. The learned Registrar dismissed the application on the ground that there were triable issues raised by the defendants. The plaintiffs appealed.

e

Held:

Summary judgment under O. 14 of the Rules of the High Court 1980 is inappropriate as there were triable issues in the following matters:

f

[1] whether the qualified titles were in fact available when the agreement was entered;

[2] whether there was a fundamental breach of the agreement which entitled the defendants to rescind; and

[3] whether building approval was obtained prior to the determination of the agreement, and, if no approval was obtained, whether the issuance of building approvals by the Majlis Daerah, Kluang Utara, at L.K. 2 entitles the plaintiffs to the claim.

g

[Appeal dismissed.]

Case referred to:

Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd. [1987] CLJ (Rep) 182

For the plaintiffs - Rais Yatim; Hariram Jayaram (Ng Kong Yeap assisting); M/s. Kong Yeap & Chui Seng)

h

For the defendants - Y.M. Raja Aziz Addruse (Philip Choong assisting); M/s. Philip Choong & Co.

JUDGMENT

Mohd. Yusoff Mohamed J:

i

I apologise for the delay in giving this ruling. This was due mainly to dislocation of work resulting from my transfer to Kuala Lumpur.

This appeal concerns the dismissal by the Senior Assistant Registrar of an application by the plaintiffs under O. 14 of the Rules of the High Court 1980.

The plaintiffs' claim is for the sum of RM15,378,000, as balance of the purchase price for the sale of shares in Mengkibol Kemajuan Sdn. Bhd., (Mengkibol), to the defendants. The plaintiffs were shareholders of 2,268,000 shares or 70% holders of Mengkibol issued shares and the defendants, a limited company.

Mengkibol owned 3,236 lots of lands at Kluang, Johor, for housing development, comprising of various lots approved for bungalows, shop houses, terrace, low cost and semi-detached houses. The titles to the lands were described in the 2nd schedule of the agreement as "PTDs". These PTDs were approved by the State Government of Johor on 30 September 1980. At the time of the agreement these lands were charged to Kwong Yik Bank Bhd. by Mengkibol.

The sales of these shares were stipulated in the following terms:

Clause 4: the sale price was at RM19,278,000;

- (a) RM3,900,000 deposit was to be paid upon execution of agreement;
- (b) RM7,753,000 was to be paid within 30 days of receipt from appropriate authorities of all building approval as may be required for development of the land;
- (c) the balance sum was to be paid on or before one year from the date of receipt of such approval mentioned in para. (b).

This sale was also subject to the following covenant by the plaintiffs as vendor. The relevant covenant is as in Clause 5(f)(iv), which states:

- (iv) that the individual qualified titles of the said lands are available subject only to the issue of a bank guarantee for the sum of about Ringgit 877,000 to the Pemungut Hasil Tanah, Keluang.

On 16 September 1983, upon execution of the agreement, the plaintiffs were paid RM3,900,000 by the defendants as deposit.

On 26 September 1983, a bank guarantee for RM877,000 was obtained by the defendants and sent to the Pemungut Hasil Tanah, Kluang, pursuant, to Clause 5(f)(iv) of the agreement.

On 2 April 1984 and 29 May 1984, the defendants wrote to the plaintiffs expressing their concern on the delay by the plaintiffs to obtain the qualified titles. There was no reply from the plaintiffs.

On 13 June 1984, the defendants terminated the agreement on the ground that there was a breach of fundamental term of the contract and material misrepresentation by plaintiffs with regard to the availability of the qualified titles - Exh. "ZMZ1".

On 29 June 1984, the plaintiffs' solicitors replied objecting to the defendants' termination of the agreement and argued that the qualified titles were always available and that it was the direct responsibility of the defendants to obtain them.

On 3 September 1984, building approvals, as referred to in Clause 4(b) & (c) of the agreement, were received by the plaintiffs - Exh. "LK2".

On 2 December 1985, a notice of demand was sent to the defendants for the balance sum of RM15,378,000. The defendants failed to pay and this claim was instituted against the defendants, followed by this application for summary judgment by the plaintiff.

- a** In dismissing the application by the plaintiffs the learned Registrar held that triable issues have been raised by the defendants as to whether there has been a breach of contract by the plaintiffs and whether the breach was fundamental as to allow the defendants to terminate the contract.

In their arguments in this appeal, Counsel for both sides state that the facts were not in dispute.

- b** The plaintiffs/appellants' Counsel, however, argued that there was no breach of Clause 5(f)(iv) of the agreement for the reason that at the time when the agreement was entered the qualified titles to the lands were not in hand and the parties contracted that they were available. That the meaning of the word "available" in *Shorter Oxford Dictionary* means "within one's reach". Therefore, when the defendants applied for the qualified titles to Pemungut Hasil Tanah on 28 September 1983, those qualified titles were within reach of the defendants.

- c** Further, he argued that since by Clause 6(c) of the agreement the defendants covenanted to manage the company (Mengkibol) in the interim period, it was the defendants' responsibility to obtain the qualified titles. He submitted that there is, therefore, no triable issue.

- d** The defendants/respondents' Counsel on the other hand, argued that clause 5(f)(iv) stands by itself and has nothing to do with Clause 6(c) of the agreement. That the agreement must read as a whole and that Clause 5(f)(iv) entitled an innocent party to rescind in the event of breach thereof. That the defendants had taken issue with the plaintiffs with regard to the qualified titles as early as 2 April 1984 very soon after the agreement, and the plaintiffs had only replied after agreement was rescinded on 13 June 1984. That the argument by the plaintiffs now seemed to be that the plaintiffs are absolved from responsibility to obtain the qualified titles.

- e** Upon hearing these arguments it seems clear that dispute on the availability of qualified titles had arisen before this application for summary judgment which makes it inappropriate for an O. 14 judgment. The issue raised is not one solely a question of law, pure and simple, and the facts are clear as the Counsel made it out to be for the Court to exercise its powers for summary judgment - see *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] CLJ (Rep) 182.

- f** On sight of the facts it would seem that at least the following issues are triable:

1. whether the qualified titles were in fact available when the agreement was entered;
 2. whether there was a fundamental breach of the agreement which entitled the defendants to rescind; and
 3. whether building approval was obtained prior to the determination of the agreement, and, if no approval obtained, whether the issuance of building approvals by the Majlis Daerah, Kluang Utara, at LK2 entitles the plaintiffs to the claim.
- g**

For these reasons this appeal is dismissed with costs. Unconditional leave to the defendants is granted.

h

Also found at [1989] 2 CLJ 826

i